

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Miller Breweries East)
Application for Authority To Operate a 900 MHz) FCC File No. 0002940300
Business and Industrial Land Transportation)
Station in Trenton, Ohio)
and)
Request for Waiver of 900 MHz Application)
Filing Freeze)

ORDER

Adopted: October 10, 2008

Released: October 10, 2008

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. Introduction. We address a request for waiver filed by Miller Breweries East (Miller).1 Miller seeks a waiver of the 900 MHz application freeze2 prohibiting the filing of applications for new licenses. Miller requests a waiver to permit the processing of its application for frequencies formerly authorized to it under 900 MHz Trunked, Industrial Land Transportation Station WPIM837 in Trenton, Ohio. For the reasons stated below, we grant the request for waiver and permit the processing of Miller's application.

2. Background. On July 26, 2000, the Commission authorized Miller to operate the facilities authorized under Call Sign WPIM837. Miller operates the station to coordinate personnel and various activities at its brewery in Trenton, Ohio.3 The brewery employs approximately 650 people, and has several hundred visitors each year.4 Miller requests grant of its waiver request and processing of the underlying application in order to protect the lives and safety of its employees and brewery visitors. In particular, Miller notes that the refrigeration system at its Trenton plant uses 150,000 pounds of anhydrous ammonia, a substance classified by the U.S. Environmental Protection Agency as extremely

1 See FCC File No. 0002940300, Application for Wireless Telecommunications Bureau Radio Service Authorization (filed Mar. 8, 2007; amended Aug. 22, 2007 and May 2, 2008) (Waiver Request).

2 See Wireless Telecommunications Bureau Freezes Applications in the 900 MHz Band, Public Notice, 19 FCC Rcd 18277 (WTB 2004) (900 MHz Freeze Notice); see also Amendment of Part 90 of the Commission's Rules to Provide for Flexible Use of the 896-901 MHz and 935-940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool, WT Docket No. 05-62, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 20 FCC Rcd 3814 (2005) (900 MHz NPRM).

3 Waiver Request at 1-2.

4 Id. at 2.

hazardous.⁵ In the event of plant evacuation or theft, and because its Trenton facility does not have a public address system, Miller relies on its internal communications system to relay vital information.⁶

3. On September 17, 2004, the Wireless Telecommunications Bureau (Bureau) instituted a freeze on applications for new 900 MHz Business and Industrial Land Transportation (B/ILT) authorizations because it feared that the exceptionally large number of applications it had received could compromise its ability to accommodate displaced systems during the 800 MHz band reconfiguration process designed to resolve interference to public safety communications.⁷ The Bureau stated that it would continue to accept applications for license modification and would entertain requests for waiver of the 900 MHz application freeze.⁸ The Commission subsequently released a *Notice of Proposed Rulemaking* seeking comment on the possibility of geographic licensing in the 900 MHz B/ILT band, which reaffirmed the freeze and reiterated that it would consider requests for waiver of the freeze.⁹

4. On July 18, 2005, the Commission sent Miller a license renewal reminder letter.¹⁰ Miller, due to what it characterizes as an inadvertent oversight, failed to file a license renewal application.¹¹ On October 12, 2005, the authorization for Call Sign WPIM837 expired by its own terms. On March 8, 2007, Miller filed the subject application, which seeks a new permanent authorization to cover its operation of the existing facilities.¹² Miller also requests a waiver of the freeze on new 900 MHz license applications to permit the processing of its application.¹³

5. *Discussion.* To obtain a waiver of the Commission's Rules, a petitioner must demonstrate either that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;¹⁴ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹⁵ We conclude that Miller has demonstrated that grant of its waiver request would not frustrate the underlying purpose of the freeze.

⁵ *Id.*

⁶ *Id.*

⁷ See *900 MHz Freeze Notice*, 19 FCC Rcd at 18277-78.

⁸ *Id.* at 18278 n.7.

⁹ See *900 MHz NPRM*, 20 FCC Rcd at 3836 ¶ 67.

¹⁰ See FCC Renewal Reminder Letter, Reference No. 3622807 (Jul. 18, 2005).

¹¹ See Waiver Request at 2.

¹² File No. 0002940300 (filed Mar. 8, 2007; amended Aug. 22, 2007 and May 2, 2008). In a separate application dated August 17, 2007, Miller requested Special Temporary Authority (STA) to operate the subject 900 MHz Service facilities; this application was granted August 28, 2007, under Call Sign WQHL302. FCC File No. 0003140158 (filed Aug. 16, 2007). The STA was renewed on February 20, 2008 (FCC File No. 0003328305, filed Feb. 19, 2008), and expired on August 18, 2008.

In June 2008, SABMiller, plc (parent company of Miller Breweries East) and the Molson Coors Brewing Co. merged; the resulting joint venture is called MillerCoors, LLC (MillerCoors).

Prior to the expiration of the above Miller STA, the new MillerCoors joint venture requested STA by filing an application on July 15, 2008 to operate the subject 900 MHz Service facilities; the application was granted July 25, 2008, under Call Sign WQJC722. FCC File No. 0003504078 (filed Jul. 15, 2008). This STA expires January 21, 2009.

¹³ Waiver Request at 1-3.

¹⁴ 47 C.F.R. § 1.925(b)(3)(i).

¹⁵ 47 C.F.R. § 1.925(b)(3)(ii).

6. The purpose of the freeze on applications for new 900 MHz B/ILT licenses is to preserve adequate spectrum resources during the 800 MHz band reconfiguration as well as to preserve the spectrum landscape until the Commission resolves the geographic licensing issues raised in the *900 MHz NPRM*.¹⁶ With regard to the freeze, Miller seeks a waiver pursuant to the *900 MHz Freeze Notice* and the *900 MHz NPRM*.¹⁷ Miller contends that the purpose of the freeze would not be frustrated by grant of its request,¹⁸ that such a grant would serve the public interest,¹⁹ and that it would also avoid the imposition on Miller of inequitable and otherwise undue burdens.²⁰

7. Miller notes that the freeze was intended to ensure that Nextel Communications, Inc. (now Sprint Nextel), has the ability to obtain necessary spectrum in order to “house some of its systems while the 800 MHz band is reconfigured to abate unacceptable interference to public safety, critical infrastructure, and other ‘high site’ 800 MHz systems.”²¹ Miller explains that its application only asks the Commission to reauthorize facilities that were already authorized and operational at the time the Commission imposed the freeze.²² Because this spectrum was already encumbered and, thus, would not be available for use in connection with Nextel’s re-banding efforts, but for Miller’s inadvertent failure to renew the subject license, Miller claims it is “exactly the type of applicant contemplated by” the *900 MHz NPRM*.²³ Miller also contends that, in at least one other case where an incumbent’s license has expired, the Commission permitted the reauthorization of the license, even in the face of an ongoing application freeze.²⁴

8. Miller believes that a grant of the waiver is in the public interest, stating that the license is necessary for the protection of the life and safety of its employees and visitors to the Trenton brewery.²⁵ The applicant is particularly concerned that it have a viable communications network in the event of plant evacuation or theft of the anhydrous ammonia.²⁶ Miller notes that it seeks simply to secure the use of the spectrum for which it was previously authorized, to be put back into the position it was in prior to the license’s expiration.²⁷

9. As noted, Miller was licensed for Station WPIM837 until that license expired in October 2005. Thus, Miller was authorized to operate Industrial Land Transportation Station WPIM837 prior to the Commission’s decision to institute a freeze on new applications for 900 MHz B/ILT spectrum. Miller does not seek to modify any of its formerly licensed channels. Because grant of the underlying application will restore the channels and the exact operating parameters of the previous authorization, we believe that grant of this waiver and our processing of the related application will not interfere with the spectrum needs associated with the 800 MHz proceeding, or affect the 900 MHz B/ILT spectrum landscape during the pendency of the 900 MHz rulemaking. Further, given that Miller was an established

¹⁶ See *900 MHz Freeze Notice*, 19 FCC Rcd 18277; *900 MHz NPRM*, 20 FCC Rcd at 3836 ¶ 67.

¹⁷ Waiver Request at 1-3.

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2-3.

²¹ Waiver Request at 1 (*citing 900 MHz Freeze Notice*).

²² Waiver Request at 1.

²³ *Id.* at 1-2.

²⁴ *Id.* at 3 (*citing* Cam Jo, Inc., DBA Clearwater Yellow Cab Pascot & Tarpon Springs, *Order*, 22 FCC Rcd 3843 (WTB MD 2007)).

²⁵ Waiver Request at 1-2.

²⁶ *Id.* at 2.

²⁷ *Id.*

900 MHz licensee before the 800 MHz reconfiguration decision, it would not have been affected by the application freeze had it filed a timely renewal application. Thus, grant of the waiver will not interfere with the underlying purpose of the 900 MHz freeze.

10. Grant of the waiver request serves the public interest. The waiver permits the processing of an application that preserves a radio communications system that is used continually by Miller to carry out safety and security functions at its Trenton facility. Miller has satisfactorily shown that the underlying purposes of the 900 MHz freeze (*i.e.*, to preserve unencumbered 900 MHz spectrum for possible future geographic licensing, as well as to support 800 MHz rebanding) would not be frustrated by grant of a waiver in this instance, in that, but for Miller's inadvertent oversight, the spectrum would in fact have been encumbered.

11. For the aforementioned reasons, we grant Miller's request for waiver of the 900 MHz freeze and permit the processing of its application. To the extent Miller may have operated on the subject frequencies without Commission authorization during the period after the expiration of the license for Station WPIM837 and before the Commission granted Miller an STA, our decision is without prejudice to any Enforcement Bureau action.²⁸

12. Accordingly, IT IS ORDERED, pursuant to Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the waiver request filed by Miller Breweries East, on March 8, 2007, as amended August 22, 2007, with FCC File No. 0002940300 IS GRANTED.

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that application FCC File No. 0002940300, filed by Miller Breweries East, on March 8, 2007, as amended August 22, 2007, SHALL BE PROCESSED in accordance with this *Order*.

14. This action is taken under delegated authority pursuant to sections 0.131(a) and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131(a), 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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²⁸ See 47 C.F.R. § 1.903 (authorization required). Notwithstanding our decision in this particular case, we caution that a licensee must abide by the Commission's filing deadlines. All licensees are responsible for filing renewal applications and related petitions in a timely manner. Thus, we admonish Miller to conform to this requirement in the future and to take any necessary steps to avoid future occurrences, as the Commission does not routinely grant such waiver requests. Further, we note that the Enforcement Bureau has issued a penalty against Miller for unauthorized operation of WPIM837, and failure to renew its license. See *In the Matter of Miller Breweries East, Inc., Trenton, Ohio, Notice of Apparent Liability for Forfeiture*, 23 FCC Red 127 (EB 2008).